

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

JOSEPH JAMES FALCETTA JR.	§	
v.	§	CIVIL ACTION NO. 6:06cv176
DIRECTOR, TDCJ-CID	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Joseph Falcetta, proceeding *pro se*, filed this application for the writ of habeas corpus under 28 U.S.C. §2254 complaining of the legality his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

After review of the petition, the Magistrate Judge issued a Report on April 24, 2006, recommending that the petition be dismissed. The Magistrate Judge noted that this is the second habeas corpus petition which Falcetta has filed challenging this conviction; his first petition was styled Falcetta v. Director, TDCJ-CID, civil action no. 6:02cv422, which petition was dismissed with prejudice on September 17, 2003, based on the expiration of the statute of limitations. Some 20 months later, on May 2, 2005, Falcetta filed a motion for leave to take an out-of-time appeal, which was denied on July 18, 2005. Falcetta sought reconsideration of this denial, which reconsideration was denied on September 2, 2005. The present case was filed on April 14, 2006.

In her Report, the Magistrate Judge observed that under 28 U.S.C. §2244(b)(3), before a second or successive petition is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. In this case,

Falcetta did not show that he had received nor even sought leave from the Fifth Circuit to file a successive petition. The Magistrate Judge therefore recommended that the case be dismissed without prejudice, with refiling conditioned upon Falcetta's receiving permission from the Fifth Circuit to file a successive petition.

Falcetta filed objections to the Magistrate Judge's Report on June 12, 2006. In his objections, Falcetta says that the merits of his claims have never been heard, the procedural bars used to dismiss his claims are unconstitutional because they deny his right to habeas corpus, he continues to find evidence favorable to him, he received ineffective assistance of counsel, and irrelevant and inflammatory evidence was offered at trial. He says that the case was highly publicized and that this led to the constitutional violations in the case.

Falcetta's contentions amount to arguments why he should be allowed to present a successive petition. As the Magistrate Judge observed, such arguments must be addressed to the Fifth Circuit, not to the district court, because only the Fifth Circuit can grant leave to file a successive petition. Falcetta does not dispute that he filed a prior habeas corpus petition, nor that he has not received permission to file a successive one. This Court offers no opinion as to the merits of Falcetta's claims nor of whether or not he should be allowed to file a successive petition; however, Falcetta's objections are without merit because he must obtain leave from the Fifth Circuit to file a successive petition, and he has not done so.

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the original petition, the Report of the Magistrate Judge, the Petitioner's objections thereto, and all pleadings, documents, and records in the case. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the objections of the Petitioner are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED without prejudice for failure to obtain leave from the Fifth Circuit to file a successive petition. Falcetta may refile this petition at such time, and only at such time, as he obtains leave from the Fifth Circuit Court of Appeals to file a successive petition. 28 U.S.C. §2244(b)(3). It is further

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

SIGNED this 7th day of July, 2006.



MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE